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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

KELLI GRAY, and all others similarly  
situated,

Plaintiff,

v.

SUTTELL & ASSOCIATES;  
MIDLAND FUNDING, LLC; MARK  
T. CASE, and JANE DOE CASE,  
husband and wife, KAREN HAMMER  
and JOHN DOE HAMMER, wife and  
husband.

Defendants.

Case No.: CV-09-251-EFS

MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION TO STRIKE  
"EXHIBIT 'A'" ATTACHED TO THE  
SUTTELL DEFENDANTS  
MEMORANDUM REGARDING  
APPLICABLE STATUTE OF  
LIMITATIONS (Ct. R 34-1, pp. 16-22)

The Suttell Defendants have produced no admissible evidence in support of  
their Motion for Summary Judgment Re: Statute of Limitations. (Ct. Rec. 32). The

1 Suttell Defendants argument is supported only by Exhibit “A” attached to their  
2 Memorandum. Exhibit “A” consists of:

- 3 a. Declaration of Elizabeth Neu, “Form 400”, (Ct. Rec. 34-1, p. 16);
- 4 b. Signature page for Declaration of Elizabeth Neu, form “WA1” (Ct. Rec. 34-  
5 1, p. 17,);
- 6 c. “Bill of Sale and Assignment” (Ct. Rec. 34-1, p.18-19,);
- 7 d. “Spiegel” Statement (Ct. Rec. 34-1, p. 20);
- 8 e. FCNB Agreement (Ct. Rec. 34-1, p.21).

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11 The Plaintiff objects to the admission of these documents.

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13 I. The Records are Hearsay

14 “‘Hearsay’ is a statement, other than one made by the Declarant while  
15 testifying at the trial or hearing, offered in evidence to prove the truth of the matter  
16 asserted.” Fed. R. Evid. 801(c). Hearsay is not admissible unless an exception  
17 applies. Fed. R. Evid. 802. The Defendants may claim that the “regularly kept  
18 records” (often called “business records” exception) applies. ER 803(6). But these  
19 records do not and can not meet that exception for a number of reasons.<sup>1</sup>

20  
21 The Plaintiff does not dispute that “Exhibit ‘A’” was filed in the State Court  
22 Collection Lawsuit. The Defendants offer the “Exhibit ‘A’” for the alleged truth of  
23 the matter therein hoping it would demonstrate that FCNB owned the Gray account  
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<sup>1</sup> The deposition of the Affiant Elizabeth A. Neu has been noted for August 16, 2010 in Minneapolis Minnesota.

1 (Defendants Memorandum, Ct. Rec. 34, p.2, ln. 13-14, 21-23; p.8, ln. 4-5, 15-16).

2 In addition, “Exhibit ‘A’” is not only not admissible but also unreliable since  
3 “Exhibit ‘A’” attached to the Suttell Memorandum is not an original. “Exhibit ‘A’”  
4 contains internal inconsistencies which would also justify removal from the record.  
5

6 II. Declaration of Elizabeth Neu, “Form 400” (Ct. Rec. 34-1, p. 16), and form  
7 “WA1” signature page for “Form 400” (Ct. Rec. 34-1, p. 17)

8 The Affidavit of Elizabeth A. Neu makes conclusory unsupported opinion,  
9 hearsay statements in anticipation of litigation. The statements are also inconsistent  
10 with documents attached to the Affidavit. (Ct. Rec. 34-1, p. 16-17).  
11

12 There is no statement in the Neu Affidavit that Ms. Neu has ever seen the  
13 attached records before. Ms. Neu’s Affidavit makes conclusions that she claims  
14 she is able to make from her review of Defendant Midland Funding, LLC’s  
15 records.  
16

17 Defendants claim the account was owned by FCNB but the only assignment  
18 is from “Spiegel Acceptance Corporation.” (Ct. Rec. 34-1, p. 18-19). Defendant  
19 claims FCNB is the original creditor. How did the Spiegel account get from FCNB  
20 to Spiegel Acceptance? Ms. Neu states that “Midland Funding (sic) LLC is the  
21 current owner of, and/or successor to, the obligation sued upon.” This claim is  
22 unsupported. Ms. Neu does not reference the Bill of Sale or authenticate it as a  
23 business records but rather, offers her opinion that the “final statement of account”  
24 shows a balance of “\$2,065.22” with an interest rate of “0.00%” on December 31,  
25

1 2004. (Ct. Rec. 34-1, p. 16). Attached to her declaration is a May 3, 2003,  
2 “Spiegel” statement showing a balance of “\$1,394.76.” (Ct. Rec. 34-1, p. 20). The  
3 discrepancy is not explained. It is further unexplained how there could be a “final  
4 account balance” on December 31, 2004, when the OCC required FCNB to cease  
5 and desist servicing all accounts, “no later than June 30, 2003.” (Ct. Rec. 62-1, p.5)

7 Ms. Neu makes other conclusory hearsay statements, “defendant did fail to  
8 make payments”, and “the attorneys representing plaintiff (sic) Midland Funding  
9 (sic) LLC were retained on Midland Funding (sic) LLC (sic) behalf”, which should  
10 be stricken. (Ct. Rec. 34-1, p. 16). Midland Funding, LLC has stated it did not  
11 retain Suttell & Hammer, P.S.  
12

14 The Declaration of Elizabeth Neu is created in anticipation of litigation.  
15 Suttell’s records indicate that on August 22, 2008, the Suttell Defendants sent a  
16 request to Midland Credit Management for an “Affidavit from Client”. (Ct. Rec.  
17 62-3, pp. 27-28). On September 2, 2008, the Affidavit of Elizabeth Neu was  
18 received by Defendant Suttell. (Ct. Rec. 62-3, pp. 27-28). Records created in  
19 anticipation of litigation are inherently “untrustworthy” and should not be  
20 admitted. *U.S. v. Olano*, 62 F.3d 1180, 1205 -1206 (9<sup>th</sup> Cir., 1995). The court  
21 should strike the Declaration from the record.  
22  
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1 III. "Bill of Sale and Assignment" (Ct. Rec. 34-1, p.18-19,)

2 The "Bill of Sale and Assignment" states "Spiegel Acceptance Corporation",  
3 not FCNB, is transferring the account to Defendant Midland Funding, LLC. (Ct.  
4 Rec. 34-1, p.18). The Suttell Defendants' entire argument is based on Ms. Gray's  
5 account being formed by FCNB. The Suttell Defendants offer no explanation how  
6 and FCNB account could be assigned by "Spiegel Acceptance." The "Bill of Sale  
7 and Assignment" describes an "account schedule attached hereto as Exhibit A."  
8 (Ct. Rec. 34-1, p. 18). No "account schedule" is attached, nor is it attached in the  
9 State Court.  
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12 FCNB was ordered to cease and desist servicing all accounts by the Office  
13 of the Comptroller of Currency ("OCC") no later than June 30, 2003. (Ct. Rec. 62-  
14 1, p.5). The Bill of Sale is dated December 4, 2007. (Ct. Rec. 34-1, p. 18). The  
15 Defendant provides no explanation.  
16

17 IV. "Spiegel" Statement (Ct. Rec. 34-1, p. 20)

18 Defendants brief states the statement was from FCNB. (Ct. Rec. 34, p. p.8,  
19 In. 6). In his deposition, Defendant Mark Case stated he believed the statement was  
20 received from Spiegel. (Case Depo., Ct. Rec. 42-1, pp 44). Defendant Midland  
21 Funding, LLC has produced purported September 2, 2004 statement. (Ct. Rec. 62-  
22 2, p. 21). The September 2, 2004, statement is inconsistent with the one offered by  
23 the Suttell Defendants. For instance, the Midland Statements requests payment to a  
24  
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1 different address (“Card Processing Center”) and states another inconsistent  
2 balance (“\$1,604.77”) (Ct. Rec. 62-2, p. 21).

3  
4 V. “FCNB Agreement” (Ct. Rec. 34-1, p. 21)

5 A document titled “FCNB Card Account Agreement” is also included in  
6 “Exhibit ‘A’”. The Defendants cite to the purported agreement to support the  
7 conclusory statement, “It is undisputed here that the written agreement with Ms.  
8 Gray was with FCNB.” (Ct. Rec. 34-1, p. 8, ln. 5). This is not true. Plaintiff Gray’s  
9 name does not appear anywhere on the purported agreement. (Ct. Rec. 34-1, p. 21).  
10 The effective date of the agreement is not listed. (Ct. Rec. 34-1, p. 21). The  
11 agreement does not mention a Spiegel credit card. (Ct. Rec. 34-1, p. 21). The  
12 agreement is unsigned. (Ct. Rec. 34-1, p. 21). Nothing in the purported agreement  
13 suggests it applies to the Plaintiff or the subject Spiegel account. There is no  
14 affidavit stating it was mailed or otherwise provided to Ms. Gray.  
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17 VI. Conclusion  
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19 For the reasons stated above, “Exhibit ‘A’” attached to the Defendants  
20 Memorandum in Support of Summary Judgment Re: Statute of Limitations, should  
21 be stricken from the record and not considered by the Court.  
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1 DATED this the 2<sup>nd</sup> day of August 2010.

2  
3 *Michael D. Kinkley P.S.*

4 s/Scott M. Kinkley

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CM/ECF CERTIFICATE OF SERVICE

I hereby certify that on the 2<sup>nd</sup> day of August, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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